UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

Indianapolis, IN

HOLMES HEATING & COOLING

and Case 25-RC-10246

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 20, a/w SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO [1]

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held August 12 and 19, 2004, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine an appropriate unit for collective bargaining.[2]

I. ISSUES

Sheet Metal Workers' International Association, Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL-CIO, (herein called the Petitioner), seeks an election within a unit comprised of all full-time heating, ventilation and air-conditioning installers, service persons and fabricators employed by the Employer, Holmes Heating & Cooling at its Lafayette, Indiana facility. On July 29, 2004, the Employer was served with a copy of the

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[1] The name of the Petitioner has been corrected to reflect its full legal name.

[2] Upon the entire record in this proceeding, the undersigned finds:

a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.

b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

c. The labor organization involved claims to represent certain employees of the Employer.

d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

petition herein and a notice that a hearing regarding the petition would occur at the Regional office on August 12, 2004. This notice of hearing was served upon the Employer both by facsimile transmission and first class United States mail. At the hearing, however, neither the Employer's owner nor any other representative of the company appeared. Nonetheless, a hearing was conducted during which evidence was received regarding the effect of the Company's business upon interstate commerce; the status of the Petitioner as a labor organization; and evidence concerning the appropriateness of the petitioned unit.

II. DECISION

For the reasons discussed in detail below, it is concluded that the Board has jurisdiction over Holmes Heating & Cooling; that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act; and that the petitioned unit of employees constitutes a unit appropriate for purposes of collective bargaining.

The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time installers, service persons and fabricators of heating, ventilation and air-conditioning systems employed by the Employer at its Lafayette, Indiana facility; BUT EXCLUDING the Employer's owner and his son, all professional and technical employees, sales agents, office clerical employees, guards and supervisors as defined in the Act, and all other employees.

The unit found appropriate herein consists of approximately three employees for whom no history of collective bargaining exists.

III. STATEMENT OF FACTS

A. The Business Operations of the Employer

The Employer is a contractor located in Lafayette, Indiana which is engaged in the installation and service of heating, ventilation and air-conditioning systems. According to testimonial evidence, the Employer is a sole proprietorship owned by Tom Holmes. He, his son Bill, and approximately three employees comprise the company's workforce. Approximately 90% of the company's business involves the installation of furnaces and air-conditioning units in homes under construction, and the installation is done pursuant to contracts between the Employer and residential contractors. The remainder of the business involves the replacement of existing residential furnaces and air-conditioners, and the service of units. According to the testimony of two employees, the four employees (one of whom is the owner's son) usually work in pairs, jointly performing installation work. In addition, owner Tom Holmes and two of the employees perform service work. The employees work Monday through Friday from 7:00 AM

to 3:00 PM or 8:00 AM to 4:00 PM. Service work is generally performed later in the day or on Saturday. Two of the employees earn $9.00 per hour; son Bill earns $12.00 per hour; and the wage of the fourth employee is not known.

On several occasions during the five months prior to the hearing, Bill Holmes told his team partner (an employee-witness at the hearing) that he wanted the company to stay in business for a long time "because he's eventually going to take it over when his father retires."[3] According to the second employee-witness, on an occasion when he worked with Bill, Bill stated that he wanted the contractors to be pleased with the Company's work because "I'm going to take this over one of these days, and I want to make it look good."

B. The Employer's Relationship to Interstate Commerce

According to the testimony of the two employees and a representative of a Lafayette company which is engaged in the wholesale distribution of heating, ventilation, air-conditioning and plumbing equipment and supplies, the Employer purchases all of its furnaces, air-conditioners and other supplies from this single supplier. According to the representative of the supply house, the Employer has purchased at least $50,000 worth of furnaces and air-conditioners during the past year which were shipped directly from outside the State of Indiana. Furnaces and air-conditioners purchased from Westinghouse were manufactured and shipped from St. Louis, Missouri, while units purchased from Inner City Products were manufactured and shipped from Lewisburg, Tennessee. Units vary in price between $400 and $1,000 depending upon size. The supplier also indicated that Holmes purchases an average of six to eight units per week. This is consistent with the testimony of the two employees. In addition, sheet metal ductwork which is purchased from the supplier is manufactured by Southwark in Pennsylvania, although the supplier was uncertain whether it was shipped directly from the manufacturer or shipped to a distributor who in turn sold it to the supply house.

C. Labor Organization Status

The Petitioner is a local union affiliate of the Sheet Metal Workers' International Association, AFL-CIO, and has been recognized by the Board as a labor organization within the meaning of Section 2(5) of the Act for many years.[4] The Local's geographic jurisdiction includes most of the state of Indiana, plus three and one-half counties in Michigan. It represents employees who work n the sheet metal industry, including employees who work with sheet metal in conjunction with heating, ventilating, air conditioning and cooling systems. It negotiates collective bargaining agreements with employers, and approximately 100 employers are currently signatory to contracts with the Union. These collective bargaining agreements address

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[3] According to the employee-witness, Bill's age in between 30 and 40, while his father is in his mid-50's.

[4] J.O. Mory, Inc., 326 NLRB 604 (1998); Hartman Brothers Heating & Air-Conditioning, Inc., 332 NLRB No. 142 (December 12, 2000); Micrometl Corporation, 333 NLRB 1133 (2001); Abell Engineering & Manufacturing, Inc., 338 NLRB No. 42 (October 18, 2002); Ken Maddox Heating & Air Conditioning, Inc. 340 NLRB No. 7 (September 5, 2003).

employee wages, benefits, working conditions, and hours of employment, among other subjects. The Union has approximately 5,000 members.

IV. DISCUSSION

A. The Jurisdictional Issue

Under the Board's Tropicana rule, the Board will assert jurisdiction over an employer who has refused to provide information to enable the Board to determine whether the employer meets the Board's jurisdictional standards, if the record at a hearing establishes that the Board has statutory jurisdiction, Tropicana Products, 122 NLRB 121 (1958). This rule was fashioned to advance the policies underlying the Act and promote the prompt resolution of cases. The Act extends jurisdiction to all cases involving enterprises whose operations affect interstate commerce. The Board's jurisdiction has been construed to extend to all such conduct as might constitutionally be regulated under the commerce clause, subject only to the rule of *de minimus*, NLRB v. Fainblatt, 306 U.S. 601, 606 (1939). This rule provides that the Board will assert jurisdiction over an employer whose impact upon interstate commerce is more than "*de minimus*." The Board has held that revenues as little as $1,500 derived from interstate commerce are a sufficient basis for the Board's assertion of statutory jurisdiction, Marty Levitt, 171 NLRB 739 (1968); Pet Inn's Grooming Shoppe, 220 NLRB 828 (1975).

As in Tropicana, the Employer here failed to appear at hearing to provide information necessary to determine whether its operations satisfy the Board's jurisdictional standards. In the absence of the Employer, indirect testimonial evidence was received from employees concerning the Employer's purchase of items manufactured out-of-state, and direct testimonial evidence was received from the supply house which sells furnaces, air-conditioners and other equipment and supplies to the Employer which it utilizes in the conduct of its business. That evidence indicates that the Employer has a more than *de minimus* impact upon interstate commerce so that the Board is warranted in asserting jurisdiction over its business. According to the testimony of the representative of the supply house (which was corroborated by the testimony of two employees), during the past year the Employer purchased in excess of $50,000 worth of furnaces and air-conditioners which were manufactured outside the state of Indiana, and which were shipped directly to the supplier's facility in Lafayette, Indiana. According to the supply house, the Employer purchases between six and eight furnaces and/or air-conditioning units per week, at a cost of between $400 and $1000 each. Assuming that the Employer purchased the minimum of six units per week at the minimum of $400 per unit, these purchases would total $124,800 per year. Thus, it is concluded that the Employer meets both the Board's statutory and discretionary jurisdictional standards.

B. Labor Organization Status

Section 2(5) of the Act defines a labor organization as:

> … any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in

part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Two characteristics are required for an entity to constitute a labor organization: it must be an organization in which employees participate; and it must exist for the purpose, in whole or in part, of dealing with employers concerning wages, hours, and other terms and conditions of employment, Alto Plastics Mfg. Corp., 136 NLRB 850, 851-852 (1962).

The evidence in the record establishes that the Petitioner is an organization which negotiates and administers collective-bargaining agreements with employers concerning grievances, wages, pay, hours, and other terms and conditions of employment of their employees. Article 16 of the Constitution and Ritual of the International Association of which the Petitioner is an affiliate also indicates that membership is available to employees who work in the Petitioner's jurisdictional trade. No record evidence controverts the finding that the Petitioner is a labor organization within the meaning of the Act, and it has been recognized as such by the Board. Based upon the totality of evidence, it is concluded that the Petitioner is a labor organization within the meaning of Section 2(5).

C. The Appropriate Unit

Under Section 9(b) of the Act, the Board has broad discretion to determine "the unit appropriate for the purposes of collective bargaining" in each case "in order to assure to employees the fullest freedom in exercising the rights guaranteed by the Act," NLRB v. Action Automotive, Inc., 469 U.S. 490 , 494-97 (1985). The Board's discretion extends to selecting an appropriate unit from the range of units which may be appropriate in any given factual setting, and it need not choose the most appropriate unit, American Hospital Association v. NLRB, 499 U.S. 606, 610 (1991); P.J. Dick Contracting, Inc., 290 NLRB 150, 151 (1988). In the instant case, the Petitioner seeks an election within a unit consisting of the installers, service persons and fabricators employed by the Employer.

In determining an appropriate unit, the ultimate question is whether the employees share a sufficient community of interest to warrant their joinder within one unit, Alois Box Co, Inc., 326 NLRB 1177 (1998); Washington Palm, Inc., 314 NLRB 1122, 1127 (1994). In determining whether employees share such a community of interest, the Board weighs a variety of factors, including similarities in wages or method of compensation; similar hours of work; similar employment benefits; similar supervision; the degree of similar or dissimilar qualifications, training, and skills; similarities in job functions; the amount of working time spent away from the facility; the integration of work functions; the degree of interchange between employees as well as the degree of employee contact; and the history of bargaining, NLRB v. Action Automotive, Inc., 469 U.S. 490, 494-97 (1985); Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962).

In the case at hand, members of the petitioned unit share common supervision in the personage of the owner of the Company; they possess similar skills and perform similar work; they work together in teams and at times a member of one team will work with a member of the other team. Thus, some members of the petitioned unit have daily contact, while other members may have less frequent contact. The employees earn hourly wages ranging from $9.00 to $12.00

per hour; and they work similar hours. When necessary, all employees pick up equipment and materials from the sole supply house used by the Company. The two individuals who perform service functions in addition to installation work drive company-owned vehicles and may perform service functions evenings and weekends, while the two employees who perform only installation and related work, drive their personal vehicles to and from job sites. The fact that some employees perform service duties in addition installation functions is insufficient to destroy the community of interest otherwise created by the other multiple characteristics they share in common.

Accordingly, it is concluded that the installer employees, service persons and fabricators share a sufficient community of interest to warrant their inclusion within a single unit.

D. The Unit Placement of the Owner's Son

The statutory definition of an employee in Section 2(3) of the Act specifically excludes "any individual employed by his parent or spouse." Over the years the Board has interpreted this definition to exclude from collective bargaining the children of individuals who are sole shareholders of a corporation, Bridgton Transit, 123 NLRB 1196 (1959); MJ Metal Products, Inc., 325 NLRB 240 (1997). The rationale is equally applicable to children of individuals who are sole proprietors of an employer, since they are just as likely to have a greater affinity with the interests of the owner than with the interests of fellow employees, See Marvin Witherow Trucking, 229 NLRB 412 (1977). Statements made by Bill Holmes to the two employee-witnesses in this case are illustrative of this rationale: he perceives himself as the future owner/manager of the Employer and shares a greater identification with his father than with co-workers. Accordingly, Bill Holmes shall be excluded from the unit found appropriate herein.

V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the above unit, at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. An employer is a part of the construction industry when it is engaged in the business of combining labor, materials and constituent parts on a site to form, make or build a structure, Carpet, Linoleum and Soft Tile Local Union No. 1247 (Indio Paint and Rug Center), 156 NLRB 951, 959 (1966). It is clear from the record that the Employer herein is engaged in the construction industry, and according to its employees, about 90% of its work involves new construction. Therefore, the voter eligibility formula set forth in Daniel Construction, 133 NLRB 264 (1961) as modified, 167 NLRB 1078(1967) and as reaffirmed by Steiny and Company, 308 NLRB 1323 (1992) is applicable.

Eligible to vote are those employees who:

(a) were employed within the above unit during the payroll period ending immediately preceding the date of this Decision, or

(b) have been employed for a total of 30 days or more within the above unit within a period of 12 months immediately preceding such eligibility date, or

(c) have been employed within the above unit during the 12 months immediately preceding such eligibility date for less than 30 days, but for at least 45 days during the 24 months immediately preceding such eligibility date, and

(d) have not been terminated for cause or quit voluntarily prior to the completion of the last project for which they were employed.

Those in the military service of the United States may vote if they appear in person at the polls. In addition to those employees who have been terminated for cause or voluntarily quit, also ineligible to vote are those employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and the employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Sheet Metal Workers' International Association, Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL-CIO.

VI. NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices, Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VII. LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of this Decision. North Macon Health Care Facility, 315 NLRB 359

(1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 25's Office, Room 238, Minton-Capehart Federal Building, 575 North Pennsylvania Street, Indianapolis, Indiana 46204-1577, on or before **September 2, 2004**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street. N.W., Washington, DC 20570. This request must be received by the Board in Washington by September 9, 2004.

SIGNED at Indianapolis, Indiana, this 26th day of August, 2004.

/s/ Rik Lineback

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